109 (29) No. 06-1595

FILED
JUL 30 2007
OFFICE OF THE CLERK

In The
Supreme Court of the United States

VICKY S. CRAWFORD,

Petitioner,

v.

METROPOLITAN GOVERNMENT
OF NASHVILLE AND
DAVIDSON COUNTY TENNESSEE

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit**

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

Argument 1

Conclusion 5

TABLE OF AUTHORITIES

CASES:

EEOC v. Total Systems Services Inc., 221 F.3d 1171 (11th Cir. 2002) 2, 4

Robinson v. Shell Oil Co., 519 U.S. 337 (1997) 4

RULES:

Sup. Ct. Rule 10(c) 4

ARGUMENT

The parties are in agreement as to what rule of law was adopted by the Sixth Circuit in this case.[1] The court of appeals held that an employee is not protected by Title VII from retaliation for having told her employer, during an internal investigation, that she was sexually harassed. Respondent insists that the holding was correct, and that neither the participation clause[2] nor the opposition clause[3] of section 704(a) prohibit an employer from firing a worker who in those circumstances objects to sexual harassment.

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[1] Respondent argues that, in resolving the merits of petitioner's factual assertion that she was dismissed because of her participation in the internal investigation, deference should be given to the factual conclusions of the EEOC office which investigated that charge. (Br. Opp., pp. 3, 4, 7.) Neither court below addressed this factual question, which has no bearing on the legal issue decided by the courts below and which is not properly before this Court.

Respondent argues that, were this case to proceed to trial, the trier of fact would conclude that Crawford was dismissed for misconduct, rather than in retaliation for her participation in the sexual harassment investigation. (Br. Opp., pp. 1-3.) The courts below did not address the sufficiency of the evidence to establish the alleged retaliatory motive; that issue has no bearing on the Question Presented and is not properly before the Court.

[2] Br. Opp. 4 ("participation in an in-house sexual harassment investigation prior to the commencement of an EEOC proceedings is not a protected activity under Title VII's 'participation clause' "); 6 ("participation in an in-house sexual harassment investigation, not undertaken while an EEOC charge is pending, is not a 'protected activity' under Title VII.").

[3] Br. Opp. 10 ("statements made in a single interview in an investigation initiated by someone else are not protected by the opposition clause"; "[i]n answering the investigator's questions, Ms. Crawford was not 'opposing' an employment practice she considered unlawful"); 14 (court of appeals correctly "[r]equir[ed] a plaintiff ostensibly engaging in 'opposition' conduct to actually, actively initiate a complaint").

The petition identified a series of decisions in the Third, Fifth, and Eighth Circuits which have upheld Title VII retaliation claims where the asserted protected activity, as here, was participation in an employer's internal investigation or review process. (Pet. 15-17). Respondent does not deny that those circuits have upheld such claims, but argues only that in at least some of those cases the employer may have failed to assert that such activity is not protected by section 704. (Br. Opp. 10-13). Regardless of the litigation tactics selected by the defendants in those cases, it is now the law of the circuit in the Third, Fifth and Eighth Circuits that workers cannot be retaliated against for taking part in an employer's internal investigation of sexual harassment or other discrimination. That is the rule of law that is binding on district courts and appellate panels in those circuits. With regard to the Eleventh Circuit, respondent does not actually dispute the authority set out in the petition which demonstrated that in that circuit Judge Edmondson's explanation of his opinion in *EEOC v. Total Systems Services Inc.*, 221 F.3d 1171 (11th Cir. 2002), is regarded as a definitive. (See Petition, pp. 18-19).

There are other circuits where, because of the Sixth Circuit decision in the instant case, it is now unclear whether an employee can be fired for answering her employer's questions about sexual harassment. In the wake of the decision below, an attorney, union representative or EEOC official in much of the nation can no longer with confidence advise a worker that it is safe to answer an employer's questions about sexual harassment. This critical legal issue emphatically is not a matter which should be left without definitive resolution while other circuits decide whether to follow the Sixth Circuit decision

in this case (and permit retaliatory dismissals) or to adhere to the plurality rule to the contrary.

Whatever might otherwise be the benefit of further airing this issue in the lower courts, continued uncertainty about this issue is simply intolerable. If, as the Sixth Circuit has held in the instant case, workers can lawfully be fired because in the course of an internal investigation they provided truthful information about sexual harassment, employees need to be warned about that danger without further delay. If, on the other hand, participation in such investigations is indeed protected activity, that should be clarified with dispatch, so that the Sixth Circuit decision will cease to interfere with participation in internal investigations in that circuit, and will not chill throughout much of the rest of the nation employee participation in such investigations. The very uncertainty created by the decision of the Sixth Circuit in this case poses a substantial obstacle to the correction of sexual harassment and other violations of federal employment statutes.

Respondent argues that the appropriate solution to this problem would be for the EEOC to bow to the decision of the Sixth Circuit panel, and immediately alter its web site to emphatically warn workers throughout the United States that they can be fired if they answer questions from their employer about sexual harassment (or other discrimination against) a co-worker. (Br. Opp. p. 17). On this approach, the control over the national standard regarding this key question of federal law would as a practical matter rest in the hands of the two circuit judges and one senior district court judge who happened to serve on a

particular panel in Sixth Circuit. Under Article III, however, the responsibility for establishing such national standards lies with this Court.

Whether deference should be accorded to the EEOC's views regarding the *merits* of the Question Presented is, at this juncture, premature. The issue at this stage is whether the inter-circuit conflict is one which warrants review by this Court, or whether the Question Presented is "an important question of federal law that has not been, but should be, settled by this Court." (Sup. Ct. Rule 10(c)). In deciding whether to grant review, due regard should be given to the intensely practical judgment of the EEOC – which bears the primary responsibility for enforcing Title VII – that protection of participation in employer internal investigation is essential both to "the EEOC's ability to enforce Title VII"[4] and to assuring that employers will "discover and prevent discriminatory practices in the workplace."[5] In *Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997), this Court gave substantial weight to the EEOC's views regarding the degree to which enforcement of Title VII would be impeded by legalizing an entire category of retaliatory conduct.

This case presents an excellent vehicle for resolving this vital legal issue. The decision below rested squarely and solely on the question of whether section 704 of Title VII protects workers who take part in an employer's internal investigation. The Sixth Circuit (and the district court) held that such retaliation is permissible under both

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[4] Brief of the EEOC as Appellant, *EEOC v. Total Systems Services, Inc.*, 221 F.3d 1171 (11th Cir. 2000), No. 99-13196-JJ, pp. 17-18.

[5] EEOC Compliance Manual, section 914.003, part 8-II(B)(1).

the opposition clause[6] and the participation clause[7] of section 704(a). In the proceedings below, petitioner expressly and repeatedly raised both of the subsidiary legal issues that control that question - arguing that such conduct is protected by the opposition clause[8] and by the participation clause.[9]

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

In the alternative, the Solicitor General should be invited to file a brief in this case expressing the views of the United States.

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[6] Pet. App., pp. 7a-8a, 15a.

[7] Pet. App., pp. 8a-9a, 16a-17a.

[8] Final Brief for Appellant, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 19-27; Petition for Rehearing and Suggestion for Rehearing En Banc, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 5-9.

[9] Final Brief for Appellant, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 36-37; Petition for Rehearing and Suggestion for Rehearing En Banc, *Crawford v. Metropolitan Government of Nashville*, No. 05-5258, pp. 13-16.

Respectfully submitted,

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